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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

FREDERICK S. WINSTON,
Counsel for Petitioner.

HOWE P. COCHRAN,
WILLIAM N. WOOD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Supreme Court of the United States:

The petition of the R. H. Stearns Company, of Boston, Massachusetts, respectfully shows to this Honorable Court:

Summary Statement of Matter Involved.

1. The petitioner herein is a Massachusetts corporation with its principal place of business in Boston, Massachusetts (R. 4). It seeks: (1) Relief against

gratuitous remarks made in an opinion of the Court of Claims reflecting upon the character of the petitioner and damaging to the reputation of the petitioner and/or its attorneys; (2) Review of a decision by the Court of Claims dismissing petitioner's suit against the United States of America for $14,928.07 Federal income and profits taxes overpaid for the fiscal year ended July 31, 1918, and not refunded to it.

2. On or after March 1, 1924, the Commissioner of Internal Revenue transmitted to the petitioner a certificate of overassessment for the fiscal year ended July 31, 1918, showing an overpayment of $14,928.07 (R. 6-7). This overpayment was not refunded but instead was credited to an additional tax for the fiscal year ended July 31, 1917, assessed on June 26, 1923 (R. 7). The credit was made on June 28, 1924, which was more than five years after the filing of petitioner's 1917 return (R. 7).

3. The petitioner filed its income tax return for the fiscal year ended July 31, 1917, on April 10, 1918, and paid the tax shown thereon to be due (R. 4).

4. On February 19, 1921, the petitioner filed with the Commissioner of Internal Revenue an unlimited waiver for 1917 which, under the terms of Commissioner's Mimeograph 3085, expired on April 1, 1924 (R. 5).

5. On February 19, 1923, the petitioner filed with the Commissioner of Internal Revenue an uncompleted waiver form, executed by the petitioner, but with the

space left blank for the signature of the Commissioner. This waiver by its terms was unlimited in scope. It opened with the words, "In pursuance of the provisions of subdivision (*d*) of Section 250 of the Revenue Act of 1921, R. H. Stearns & Company, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent * * *" (R. 5).

6. On June 26, 1923, and within the statutory period as extended by the first waiver, the Commissioner of Internal Revenue, disregarding the second waiver which he had not accepted, assessed an additional tax against the petitioner for the fiscal year 1917 in the sum of $22,189.10 (R. 6). On the assessment list was the notation, "7/31/17 Fisc 1753361 O L 4/17/23 Waiver." No proof was offered as to what particular document the word "waiver" had reference (R. 6).

7. A portion of this additional assessment, to wit, $14,928.07, was collected on June 28, 1924 (R. 7). The collection was effected by the credit of the 1918 taxes overpaid (R. 7).

8. On February 21, 1927, this Honorable Court handed down the decision of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346. Prior to that date the Commissioner of Internal Revenue had proceeded upon the assumption that a tax assessed on time could be collected at leisure. In February, 1927, the situation as it existed in the case at bar presented an exact parallel to the *New York & Albany Lighterage Company* case. The assessment had been timely made but the collection was too late.

Accordingly on April 7, 1930, the then Commissioner of Internal Revenue, Robert H. Lucas, who had entered office on June 1, 1929, purported to accept and signed the waiver of February 19, 1923 (R. 6). Thus the date of acceptance and signing was more than seven years after the execution of the waiver by the taxpayer and almost six years after the tax collection which was thereby sought to be validated.

9. On May 20, 1930, the petitioner filed a petition in the Court of Claims demanding the refund to it of the 1918 overassessment of $14,928.07 described in Paragraph 2 above (R. 1-3).

10. Said petition was dismissed by an order of the Court of Claims dated March 13, 1933 (R. 13).

The opinion handed down by the Court of Claims at the time the order dismissing the petition was issued contained the following statements:

> "In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. *But by some mysterious channel,* after six years, the plaintiff learns the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding. No complaint was made while his signature was lacking." (Italics ours.) (R. 12.)

11. On April 6, 1933, the petitioner filed a motion for rehearing (R. 13). Said motion requested the Court of Claims to expunge from the record the state-

ment appearing in the court's opinion that the petitioner had learned of the late signing of the waiver through some mysterious channel. Said motion set out explicitly the source from which the petitioner had derived such information and the method by which it had been secured. Said motion stated further that the language of the court raised an inference of improper conduct on the part of the petitioner and/or its attorneys and tended to bring them into disrepute.

12. The motion of the petitioner in this connection was denied by the Court of Claims on May 8, 1933 (R. 13).

A certified transcript of the record in the Court of Claims, consisting of the pleadings, findings of fact, judgment and opinion of the court, is hereby furnished, attached to and made a part of this application and marked Exhibit "A" in compliance with Rule 38 of this Honorable Court.

The petitioner strongly believes that the remarks in the opinion of the Court of Claims reflecting upon the conduct of the petitioner and/or its attorneys, being entirely without foundation, are unfair and unjust and that the petitioner is entitled to relief therefrom. The petitioner further is advised and also believes that the judgment of the Court of Claims in the case at bar is erroneous. It is accordingly the judgment of the petitioner that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 3 (B) of the Act of February 13, 1925 (43 Stat. 936) and for such other and further relief in the prem-

ises as the circumstances of the case in all fairness warrant.

Questions Involved.

1. May the Court of Claims impute to a petitioner invoking its jurisdiction conduct of highly questionable character when said Court of Claims has before it not one shred of evidence justifying such imputation and when said petitioner has offered to the Court papers and documents conclusively establishing the complete propriety of the petitioner's conduct in the premises?

2. Is a waiver executed by the taxpayer on February 19, 1923, not accepted or signed by the Commissioner of Internal Revenue until April 7, 1930, and then accepted and signed by a Commissioner who entered office only on June 1, 1929, good to validate the collection at June 28, 1924, of a 1917 tax assessed on June 26, 1923?

Reasons Relied on for Allowance of Writ.

1. In rendering its opinion the Court of Claims, manifesting prejudice and malice against the petitioner, cast serious reflection upon the conduct of the petitioner and/or its attorneys. There is nothing in the record or outside of the record in this case to justify the accusation implied. Upon motion of the petitioner the Court of Claims has refused to withdraw its objectionable language. Accordingly the petitioner is without remedy in the premises except by an appeal to the conscience of this Honorable Court.

2. This is a suit for the recovery of a 1918 overpayment credited to a 1917 tax on June 28, 1924, more

than five years after the petitioner's 1917 return was filed. Such credit was valid only if made within the terms of a written consent extending the statute and signed by both the taxpayer and the Commissioner. Section 250 (d) of the Revenue Act of 1921; Section 278 (c) of the Revenue Act of 1924; Section 278 (d) of the Revenue Act of 1926, and Section 506 of the Revenue Act of 1928.

At the time of the collection of the additional tax assessed against the petitioner for the fiscal year 1917, no such written agreement was in existence. If the signing of the waiver by Commissioner Lucas on April 7, 1930, created such an agreement, the consent came into effect after the enactment of Section 1106 (a) of the Revenue Act of 1926, and Sections 506, 607 and 609 (a) of the Revenue Act of 1928, and was rendered inoperative by the terms thereof.

3. The petitioner is informed that this Honorable Court has granted writs of certiorari on motion of the Government in four cases involving questions closely related to that presented by the case at bar. Those cases are now pending before this Honorable Court. They are: *Commissioner* v. *United States Refractories Corporation,* C. C. A., 3rd, decided March 7, 1933 (No. 20, Oct. Term, 1933); *Commissioner* v. *Northern Coal Company,* C. C. A., 1st, decided January 3, 1933 (No. 18, Oct. Term, 1933); *Commissioner* v. *C. H. Sprague & Son Company,* C. C. A., 1st, decided January 3, 1933 (No. 19, Oct. Term, 1933); and *Commissioner* v. *Oswego and Syracuse Railroad Company,* C. C. A., 2nd, decided January 9, 1933 (No. 21, Oct. Term, 1933).

4. The decision of the Court of Claims in this case runs counter to a number of decisions by the Board of Tax Appeals and by the Circuit Courts of Appeal.

5. This question, involving the reality of the consent of the Commissioner and the requirement of the Commissioner's signature, is one of Federal tax law which the petitioner thought had been foreclosed in its favor by prior decisions of this Honorable Court. *Florsheim Bros. Drygoods Company, Ltd.*, v. *United States*, 280 U. S. 453, 466-467; *Aiken* v. *Burnet*, 282 U. S. 277, 281; and *Stange* v. *Commissioner*, 282 U. S. 270, 276. Cases are arising continually in the Courts and before the Board of Tax Appeals involving this issue and, notwithstanding the pronouncements of this Honorable Court in the cases cited above, the language of the various opinions is conflicting and confusing.

WHEREFORE the petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Court of Claims be granted, and that said judgment of the Court of Claims may be reversed by this Honorable Court and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. H. STEARNS COMPANY,
By FREDERICK S. WINSTON,
Attorney for Petitioner.

Of Counsel:
HOWE P. COCHRAN.
WILLIAM N. WOOD.

IN THE

Court of Claims of the United States

R. H. STEARNS COMPANY,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

No. L—187

MOTION FOR LEAVE TO SHOW THE COURT HOW PLAINTIFF CAME INTO POSSESSION OF CERTAIN INFORMATION AND FOR CORRECTION OF THE RECORD.

To the Honorable, the Chief Justice, and the Judges of the Court of Claims:

Comes now the Plaintiff, through its attorneys, HOWE P. COCHRAN, WILLIAM N. WOOD and FREDERICK S. WINSTON, and begs leave of the Court to show how certain information came into its possession and prays the Court to correct the record by eliminating from Page six of its decision, the fol-

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lowing words: "by some mysterious channel" contained in the following sentence:

> "But by some mysterious channel, after six years, the plaintiff learns that the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding."

The facts concerning the channel whereby the Plaintiff came into possession of this information are:

That on February 19, 1923, the Plaintiff herein filed with the Commissioner of Internal Revenue a form of waiver. At that time the Commissioner had not accepted and signed it for it was submitted in blank.

On April 2, 1930, and by reason of the decisions in the New York & Albany Lighterage Company case and other similar cases, among them the Estate of Fleitman, 23 B. T. A. 1418, then pending, and the enactment of Sections 506 and 607, Revenue Act 1928, it became material, as the Plaintiff's attorneys thought, to find out whether or not the above-named waiver form had ever become a consent in writing between the parties, signed by the Commissioner of Internal Revenue or anyone authorized by him.

On April 2nd, 1930, the Plaintiff's attorney, WILLIAM N. WOOD, addressed and forwarded to the Commissioner of Internal Revenue a letter asking him for copies of all waivers filed by the Plaintiff for the years 1917 and 1918.

On April 23, 1930, a photostat of the waiver form in question bearing the name of Robert Lucas showing on its face that it was signed and dated April 7, 1930, was sent to the attorney of the Plaintiff by the Deputy Commissioner of Internal Revenue. Accompanying

said photostat was a bill for seventy-five cents by the Commissioner of Internal Revenue against the attorney for the Plaintiff as a charge for such photostats as were enclosed.

This bill the Plaintiff's attorney duly paid.

Copy of the letter to the Commissioner, his answer, the waiver and the bill from the Commissioner are attached hereto.

From the above it is clear that the information did not reach the Plaintiff through any mysterious channel but in the regular course of business.

At all times the Plaintiff's attorneys have attempted diligently to conduct themselves with such dignity, openess and honesty as the superior standing of this Honorable Court requires them to do, and have attempted always to demean themselves as members of the Bar of this Honorable Court should.

Plaintiff believes and therefore invites the Court's attention to the belief that the language of the Court in this case raises an inference of improper conduct on the part of the Plaintiff and/or its attorneys, and tends to create and promote the idea that the Plaintiff and/or its attorneys have not been conducting themselves as the rules of conduct of this Honorable Court require, or as the standards of their profession and mankind generally require them to do. Whereas, the true facts are that they have in this transaction fulfilled their duty to this Honorable Court and to their client, and have not committed any act which can in any way cast reflection upon them as attorneys or as members of this Bar.

The prayer of the Plaintiff is that the words be stricken from the record; that its rights may not be prejudiced.

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The prayer of the attorneys is that these words be stricken from the record and some public mention made thereof in order that they may not be held up to ridicule and contempt by their fellow lawyers and fellow men.

The Plaintiff's attorneys state that on every hand since the decision they have been chided and criticized for the expression used by the Court; that at the time of attending a hearing before a Commissioner of the Court of Claims in Boston, Massachusetts, on March 22, 1933, persons associated with the Federal Government Tax Department in that matter chided the attorneys for the Plaintiff accusing them of having been chastised by these words of this Honorable Court.

Attorneys for the Plaintiff value their standing in this Court and before the world as members of the Bar of this Court, and they beg this Court to correct the statement in order that their good name and reputation may not be damaged or destroyed.

Respectfully submitted,

WILLIAM N. WOOD,
Attorney for Plaintiff,
Woodward Building,
Washington, D. C.

Of Counsel:
HOWE P. COCHRAN,
FREDERICK S. WINSTON.

April 2, 1930.

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please furnish me with copies of all waivers filed by the R. H. Stearns Company for the years ending July 31, 1917 and July 31, 1918.

Please furnish me with copy of certificate of over-assessment for the year ending July 31, 1918.

Yours very truly,

WNW:MI

WILLIAM N. WOOD.

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TREASURY DEPARTMENT
Washington

Office Of
Commissioner of Internal
Revenue

Address Reply To
Commissioner of Internal
Revenue and Refer to
IT:R:F:G
BMV

APR 23 1930

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Sir:

In accordance with the request contained in your letter dated April 2, 1930, there are enclosed photostat copies of waivers filed by R. H. Stearns Company, 140 Tremont Street, Boston, Massachusetts, for the fiscal years ending July 31, 1917 and July 31, 1918, and a copy of certificate of over-assessment for the fiscal year ending July 31, 1918.

Respectfully,

(Signed) DAVID BURNET,
Deputy Commissioner.

Enclosures.

(1036M)

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Income Tax Unit

RECEIVED
PAYMENT
APR 24 1930
Commissioner of
Internal Revenue.

.....19....	
....Copies Returns @ $1.00	$....
3 Copies Other Papers @ .25	0.75
....Certifications @ .50....	....
AMOUNT DUE	$0.75

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

STAMPS NOT ACCEPTED

Returns of papers furnished

Copies of waivers filed by R. H. Stearns Co., for the years July 31, 1917, and July 31, 1918, and copy of certificate of overassessment for the year July 31, 1918.

Make remittance payable to TREASURER OF THE UNITED STATES and forward to the Commissioner of Internal Revenue, Income Tax Unit, Washington, D. C., attention IT:R. Please return this statement with remittance and the copies of documents listed herein will be forwarded to you.

February 19, 1923.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. STEARNS & COMPANY, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917 and July 31, 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide Revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations, provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive and thorough consideration, and not on superficial determination of the true liability.

R. H. STEARNS & COMPANY,
Taxpayer.
By HENRY W. GIESE, *Treas.*

Attest:
(Signed) Wahlon K. Leighton
Clerk

Signed) Robt. H. Lucas,
ABN Commissioner
April 7, 1930

Affidavit.

HOWE P. COCHRAN, being first duly sworn, deposes and says:

That he is an attorney with offices at 920 Potomac Electric Power Co. Building, Washington, D. C.

That he was one of the attorneys for the petitioner in the case at bar.

That he is familiar with the entire history of the case and he knows of his own knowledge that the facts set out in the foregoing motion are true and that the letters appended thereto are true and exact copies of the originals which passed in due course of business between Mr. William N. Wood and the Treasury Department.

HOWE P. COCHRAN.

Subscribed and sworn to before me this 7th day of June, 1933.

[SEAL.] CHARLES LEO DE ORSEY,
Notary Public.

My commission expires on April 28th, 1935.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The opinion of the Court of Claims has not been officially reported. It was rendered by the Court below on March 13, 1933, and will be found in the printed record on pages 3-13.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (*b*) of the Act of February 13, 1925 (44 Stat. 936).

The final judgment of the Court of Claims was entered on March 13, 1933, and will be found on pages 3 to 13 of the printed record. The application for writ appended hereto is being filed within ninety days after such date.

This suit brought in the Court of Claims is for the recovery of an overpayment of income taxes for the fiscal year 1918 which was credited to an additional tax for the fiscal year 1917 which in turn was assessed prior to June 2, 1924, and collected more than five years after petitioner's 1917 return was filed. Jurisdiction of such claim is conferred on the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts in the case are printed in the petition and to avoid repetition, counsel begs leave to refer thereto. In its opinion the Court of Claims stated that the petitioner secured certain information in connection with the case through "some mysterious channel." Believing that such language was intended to and did call into question the conduct of the petitioner, and knowing that its conduct was above question, the petitioner seeks the relief of this Honorable Court from what it believes to be the unjust action of the Court of Claims. The further question raised by the case is whether or not a waiver dated February 19, 1923, was effective to validate the collection by credit of a 1917 tax made on

June 28, 1924. For the convenience of the court the facts in outline form are briefly set out below:

1. April 10, 1918.—Petitioner's 1917 return filed (R. 4).

2. February 19, 1921.—First waiver filed effective to April 1, 1924 (R. 5).

3. February 19, 1923.—Execution and submission of second waiver by petitioner. Unlimited in scope (R. 5).

4. April 10, 1923.—Expiration of statutory period except for waivers (R. 8).

5. June 26, 1923.—Additional assessment against the petitioner for the year 1917 made within the statutory period as extended by first waiver (R. 6, 8).

6. April 1, 1924.—Expiration of statutory period as extended by first waiver. Second waiver not yet accepted and signed by Commissioner of Internal Revenue (R. 8).

7. June 28, 1924.—Collection of above-mentioned additional tax by credit. Second waiver not yet accepted and signed by Commissioner (R. 7).

8. February 26, 1926.—Enactment of Revenue Act of 1926 including Section 1106 (*a*). Second waiver not yet accepted and signed by Commissioner.

9. May 28, 1928.—Enactment of Revenue Act of 1928 including Sections 506, 607 and 609 (*a*). Second waiver not yet accepted and signed by Commissioner.

10. June 1, 1929.—David H. Blair was succeeded by Robert H. Lucas as Commissioner of Internal Revenue. Second waiver not yet accepted and signed by Commissioner (R. 6).

11. April 7, 1930.—Waiver of February 19, 1923, accepted and signed by Commissioner Robert H. Lucas (R. 6).

IV.

The Statutes.

The statutes involved in this case are Section 250 (*d*) of the Revenue Act of 1921; Section 278 (*e*) of the Revenue Act of 1924; Section 1106 (*a*) of the Revenue Act of 1926; and Sections 506, 607 and 609 (*a*) of the Revenue Act of 1928.

V.

Specification of Error.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

(1) The court below manifested prejudice and malice against the petitioner and included in its opinion remarks which had no basis either in fact or in the record and which were calculated to bring the reputation of the petitioner and/or its attorneys into disrepute.

(2) The court below erred in holding that the waiver of February 19, 1923, was effective to validate the collection by credit of the tax in question on June 28, 1924.

VI.

Summary of Argument.

1. In deciding this case the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source.

2. Commissioner Blair never intended to nor did he accept the waiver of February 19, 1923.

3. At the time the credit was made, collection of this tax was barred.

4. The right of the Government to collect was not revived by later acts of Commissioner Lucas.

(*a*) The liability was extinguished by the 1926 Act.

(*b*) The credit was declared void by the Revenue Act of 1928.

VII.

THE ARGUMENT.

1. In deciding this case, the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source.

Reports are constantly current in Washington with respect to cases secured upon information improperly

divulged by public officer. From the decision rendered by the Court of Claims it would appear that the learned judges composing that tribunal were of opinion that the taxpayer in this case was the beneficiary of such a proscribed source of information. The lower court in its opinion made reference to the origin of petitioner's information relative to the signing of the waiver of February 19, 1923, by Commissioner Lucas on April 8, 1930, as secured through "some mysterious channel".

In a motion for rehearing, a copy of which is attached to and made a part of this brief, the petitioner explained in detail to the Court of Claims the method by which it secured the suspected facts. In such motion the petitioner called the attention of the Court of Claims to the circumstance that its equivocal language tended to bring the reputation of the petitioner and/or its attorneys into disrepute and asked the Court to modify its opinion by striking out the objectionable reference. The Court of Claims denied said motion on May 8, 1933.

It is submitted that if the Court of Claims mistakenly believed that the petitioner had secured information from an improper source, such belief would have tended to prejudice the case of the petitioner in the eyes of said Honorable Court, and thus render that court unable to decide the case upon its merits with minds free from malice and prejudice.

It is submitted further that the Court of Claims transgressed the boundaries of justice and fair dealing in making the reference above referred to and that its refusal to modify its derogatory language re-

quires the petitioner to accept the only recourse that it has and petition this Honorable Court for relief against the unjust animadversion of the court below.

2. Commissioner Blair never intended to nor did he accept the waiver of February 19, 1923.

Two waivers were filed by the taxpayer in this case. The first executed on February 19, 1921, was an unlimited assessment waiver and ran to April 1, 1924. The second was tendered by the taxpayer on February 19, 1923, and by its terms was unlimited in scope.

That Commissioner Blair never intended to accept the tender of the second waiver is evidenced by the facts that he did not sign the same, and that instead he assessed the additional tax well within the terms of the first waiver on June 26, 1923.

Prior to the decision of *Bowers* v. *New York & Albany Lighterage Company* case, 273 U. S. 346, by this Honorable Court, the Treasury Department had made it a practice not to hurry the collection of a tax which had been assessed on time. "This practice", observed Judge Littleton, in his dissenting opinion in *Naumkeag Steam Cotton Company* v. *United States,* decided by the Court of Claims on January 9, 1933, "was founded on Treasury Ruling I. T. 1446, in or about July, 1922, that where a tax had been assessed within the statute of limitations applicable thereto, collection thereof after the expiration of the five years was entirely proper, * * *. This practice was followed whether the tax was collected by credit or by distraint." Accordingly in the instant case, not deem-

ing the second waiver vital in any respect, Commissioner Blair did not accept or sign the same.

That it has been the prevailing view that the consent of the Commissioner was a vital ingredient in a consent to extend the statute is evidenced by the language of a number of decisions: *Greylock Mills* v. *Commissioner,* 31 Fed. (2nd) 655, C. C. A., 2nd; *Sabin* v. *United States,* 44 Fed. (2nd) 70, Court of Claims; *Stern Bros. & Co.* v. *Burnet,* 51 Fed. (2nd) 1042, C. C. A., 8th; *W. P. Brown & Sons Lumber Company* v. *Commissioner,* 38 Fed. (2nd) 425, C. C. A., 6th.

3. At the time the credit was made, collection of this tax was barred.

The first waiver expired on April 1, 1924. At the time of collection on June 28, 1924, no other waiver was in existence. It is true there lay at that date in the files a rejected and unexecuted waiver form, but that was ineffective to validate the collection. *Commissioner* v. *United States Refractories Corporation,* C. C. A., 3rd, decided March 7, 1933, 1933 Commerce Clearing House, Vol. III, Section 9182; *Knight Campbell Music Company* v. *Commissioner,* 23 B. T. A. 1234; *Corn Products Refining Company* v. *Commissioner,* 22 B. T. A. 605; *Thompson* v. *Commissioner,* 18 B. T. A. 1192; *Moore, Adm.,* v. *Commissioner,* 17 B. T. A. 314; *Chadbourne & Moore* v. *Commissioner,* 16 B. T. A. 961.

In other decisions the appellate courts in treating of waivers, have assumed the necessity of a signature by the Commissioner and concerned themselves pri-

marily with what constituted compliance with this requirement. *Trustees for Ohio & Big Sandy Coal Company* v. *Commissioner,* 43 Fed. (2nd) 782, C. C. A., 4th; *United Thacker Coal Company* v. *Commissioner,* 46 Fed. (2nd) 231, C. C. A., 1st; *Liberty Baking Company* v. *Heiner,* 34 Fed. (2nd) 513; District Court, West. Dist. of Penn., affirmed on this point by the C. C. A., 3rd, in 37 Fed. (2nd) 703; *Greylock Mills* v. *Commissioner,* 31 Fed. (2nd) 655 C. C. A., 2nd; *R. V. Board* v. *Commissioner,* 51 Fed. (2nd) 73, C. C. A., 6th; *The Onondaga Company* v. *Commissioner,* 50 Fed. (2nd) 397, C. C. A., 2nd; *Stern Bros. & Company* v. *Commissioner,* 51 Fed. (2nd) 1042, C. C. A., 8th.

In only one circuit has it been viewed as the law that the signature of the Commissioner was unnecessary. *Hind Rolph & Company* v. *Commissioner,* 52 Fed. (2nd) 1075, C. C. A., 9th. And that was a case where the Commissioner accepted and acted on the waiver though he had failed to sign it.

The case of *Marsh* v. *Nichols, Shepard & Company,* 128 U. S. 605, is authority for the principle that when a statute requires an official signature to an instrument, the absence of such signature renders the paper a mere "uncompleted document," ineffectual to confer the rights intended.

Accordingly at the date of the credit, collection of the tax was barred.

4. The right of the Government to collect was not revived by later acts of Commissioner Lucas.

(*a*) *The Liability Was Extinguished by the 1926 Act.*

Whether the right of the Government to collect this tax could later have been revived prior to the passage of the Revenue Act of 1926, it is not necessary to decide. Section 1106 (*a*) of the Revenue Act of 1926 provided that the running of the statute should not only bar the remedy but extinguish the liability. Thereafter the right of the Government lost all power of revival, and the courts have held that waivers given subsequently could breathe no new life into claims which were barred when the 1926 Act was passed. *Commissioner* v. *Northern Coal Company,* and *Commissioner* v. *C. H. Sprague & Son Company,* C. C. A.. 1st decided January 3, 1933, 1933 Commerce Clearing House, Vol. III, Section 9050; *Commissioner* v. *Oswego and Syracuse Railroad Company,* C. C. A., 2nd, decided January 9, 1933, 1933 Commerce Clearing House, Vol. III, Section 9052.

(*b*) *The Credit Was Declared Void by the Revenue Act of 1928.*

Under the terms of Sections 607 and 609 (a) of the Revenue Act of 1928, the credit applying this 1918 overpayment to the barred 1917 tax was void—not voidable but void. Accordingly at the date of passage of that Act, the taxpayer had a vested right to the recovery of the overpayment.

Under such facts the petitioner submits that the action of Commissioner Lucas in signing the waiver of February 19, 1923, on April 7, 1930, was a futile gesture and entirely without effect on the rights of the parties. This Honorable Court has said in *Ballinger* v. *Frost*, 216 U. S. 240 at 249:

> "Whenever in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department."

Furthermore by the express terms of the 1928 Act a waiver is invalid if executed after the expiration of the statutory period. Section 506 of the Revenue Act of 1928.

It is therefore respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determination of whether the Court of Claims may:

1. Include in its opinion entirely without justification insinuations derogatory of the character and reputation of a petitioner invoking its jurisdiction, and

2. Deny to such petitioner recovery of an overpayment credited to a 1917 tax which 1917 tax was assessed on June 26, 1923, and collected on June 28, 1924, under a waiver which was never accepted by the Commissioner of Internal Revenue in office at the time of its submission and was only signed by the succeeding Commissioner on April 7, 1930.

And to such ends it is respectfully prayed that a writ of certiorari be granted and that this Court review the decision of the Court of Claims and reverse it, and take such other and further action with respect to the matters complained of as to this Court may seem meet, proper and just.

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